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SUPREME COURT, U.S.
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No. 05-776

IN THE

Supreme Court of the United States

RICHARD DISHER, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

CITIGROUP GLOBAL MARKETS INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RULE 29.6 STATEMENT

Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.) is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (formerly known as Salomon Smith Barney Holdings Inc.), which is a wholly owned subsidiary of Citigroup Inc.

Citigroup Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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RESPONDENT'S SUPPLEMENTAL BRIEF

This Court has been holding the petition for certiorari in this case pending the Court's decisions in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 126 S. Ct. 1503 (2006), and *Kircher* v. *Putnam Funds Trust*, No. 05-409 (decided June 15, 2006). Now that the Court has issued both of those decisions, respondent Citigroup Global Markets Inc. ("Citigroup") submits this brief pursuant to this Court's Rule 15.8 to explain why those intervening decisions support denial of the petition for certiorari.

This Court decided *Dabit* precisely in accord with the Seventh Circuit's holding in this case. *Dabit* ruled that "[t]he background, the text, and the purpose of [the] pre-emption provision [in the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")] all support the broader interpretation adopted by the Seventh Circuit," 126 S. Ct. at 1507, which the Seventh Circuit applied in the opinion and judgment below. There is thus no reason for this Court to grant the petition in this case, vacate the Seventh Circuit's judgment, and remand ("GVR") in light of *Dabit*, unless the Court independently decides to issue a GVR order in light of *Kircher*. As with any held case in which this Court's decision in the plenary case—here, *Dabit*—is in accord with the decision of the court below in the held case, the Court should simply deny certiorari.

The Court, Citigroup acknowledges, did not decide *Kircher* in accordance with the decision below. In *Kircher*, this Court decided that a federal district court's order remanding a case removed under SLUSA for lack of subject matter jurisdiction may not be appealed by reason of 28 U.S.C. § 1447(d). *See Kircher*, slip op. at 5-11. The Court therefore reversed the Seventh Circuit's judgment in *Kircher*, which had permitted such an appeal.

In this case, the district court entered an order remanding to the Circuit Court for Madison County, Illinois, pursuant to SLUSA, the putative class action brought by petitioner Richard Disher. Pet. App. 13a-14a. Citigroup appealed, and the Seventh Circuit held that it had jurisdiction over the appeal. *Id.* at 4a. On the merits, the Seventh Circuit reversed the district court's order, and remanded the action to the district court with instructions to vacate the district court's prior order and to dismiss the action. *Id.* at 11a. In compliance with the Seventh Circuit's mandate, the district court entered an order on remand that disposed of the action as follows:

> In accordance with the Court of Appeals' mandate, this Court's August 10, 2004, order of remand . . . is VACATED, and Plaintiff's claims are DISMISSED with prejudice. The Clerk of Court is DIRECTED to enter judgment accordingly.
>
> IT IS SO ORDERED.

Id. at 12a.

The clerk of the district court entered judgment in accordance with this order. The clerk of the district court sent a letter to the clerk of the Circuit Court for Madison County enclosing a copy of the order by the district court that is quoted above. The clerk's office of the Circuit Court countersigned the letter, thereby acknowledging receipt of the order; returned the countersigned letter to the clerk of the district court; entered copies of the district court's order and the district court's judgment on the docket of the Circuit Court; and entered the notation "Status: Dismissed Case" on the docket of the Circuit Court.

This Court's *Kircher* decision, Citigroup acknowledges, indicates that the Seventh Circuit may have lacked appellate

jurisdiction in this case.[1] That arguable lack of appellate jurisdiction, however, does not mean that this Court should reflexively issue a GVR order. As explained in Citigroup's brief in opposition to the petition for certiorari, if this Court issues a GVR order, the Seventh Circuit would necessarily remand the case to the federal district court. *See* Respondent's Brief in Opposition 16-17. *Dabit* would then require the district court to adhere to the district court's existing judgment dismissing petitioner's action. *See id.* And even if this case somehow returned to the Circuit Court for Madison County (although that would not be the correct disposition), *Dabit* would require the Circuit Court to uphold Citigroup's federal preclusion defense under SLUSA and to dismiss the action.

Consequently, the conditions required for a GVR order are not met. It cannot be said that "a redetermination [by the lower court following a GVR order] may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). To the contrary, the "ultimate outcome" (dismissal under SLUSA) would be the same. Similarly, "the delay and further cost entailed in a remand [would not be] justified by the potential benefits of further consideration by the lower court," *id.* at 168, because a GVR order would impose delays and cost without any significant likelihood—indeed, without any likelihood at all, assuming that the lower courts follow *Dabit*—of a different ultimate result.

Petitioner challenged these views in his reply brief on the petition for certiorari. Petitioner's Reply Brief 4-5.

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[1] In this case, unlike *Kircher*, the district court's remand order affirmatively indicated that the district court did *not* believe its remand order was based on lack of subject matter jurisdiction. *See* Respondent's Brief in Opposition 8; *cf.* Reply Brief of Petitioner 3.

Petitioner, however, did not identify any way in which a GVR order could result in a different ultimate outcome if, as has now occurred, this Court in *Dabit* agreed with the position of the Seventh Circuit on the *Dabit* issue. And as petitioner asks this Court to grant his petition for certiorari, he properly bears the burden of demonstrating that a GVR order would be appropriate under *Lawrence*. He cannot carry that burden, because this Court's decision in *Dabit* forecloses the only argument that petitioner presented to the courts below for remand under SLUSA and resolves the only substantive, rather than jurisdictional, question that petitioner presented in his petition for certiorari. That argument and question turned entirely on petitioner's contention, rejected by *Dabit*, that "holder" claims, such as those petitioner attempted to bring in this action, do not satisfy the "in connection with" requirement for preclusion under SLUSA.

When petitioner (who was the plaintiff in the district court) moved in the district court to remand the action to state court, petitioner's only argument for remand under SLUSA was that, in the words of his point heading, "BECAUSE ALL OF PLAINTIFF'S CLAIMS ARE RELATED TO THE 'HOLDING' OF ONE OR MORE . . . STOCKS, SUCH CLAIMS ARE NOT 'IN CONNECTION WITH THE PURCHASE OR SALE' OF SECURITIES. PLAINTIFF'S CLAIMS ARE, THEREFORE, NOT REMOVABLE UNDER THE SECURITIES LITIGATION UNIFORM STANDARDS ACT." C.A. App. at SuppA121. In its opposition to the motion to remand, Citigroup noted that:

> For SLUSA removal to apply, a complaint must: (1) allege state law claims; (2) involve a "covered class action;" (3) concern a "covered security;" and (4) allege that in connection with the purchase or sale of the covered security, untrue statements or omissions were made, or the defendant used

> deceptive or manipulative devices. 15 U.S.C. §§ 77p(b) & 78bb(f)(2). Plaintiff does not dispute the fact that the claims in the Complaint meet the first three requirements for SLUSA preemption. Rather, Plaintiff only argues that his claims are not "in connection with the purchase or sale" of securities.

Id. at SuppA213-14. In his reply brief on the motion to remand in the district court, petitioner did not disagree with the passage quoted above from Citigroup's brief: he again asserted no basis for remand under SLUSA other than his contention that his "holder" claims did not satisfy SLUSA's "in connection with" requirement for preclusion. *See id.* at SuppA514-16. The district court initially held—we now know, in light of *Dabit*, wrongly—that because petitioner had brought "holder" claims, SLUSA did not apply. Pet. App. 13a-14a, 46a-47a.

The litigation followed the same course in the Seventh Circuit. Petitioner's point heading argued that his "claims are not preempted [under SLUSA] because [Citigroup's] conduct occurred in connection with Plaintiff's retention of securities, not in connection with Plaintiff's purchases or sales of securities." C.A. Brief of Appellee (corrected) 18; *see also id.* at 18-29. Apart from this argument, petitioner again did not dispute Citigroup's showing that the case satisfied all of the elements required for preclusion under SLUSA.

Petitioner has suggested in this Court that following a GVR order, "the state court in the first instance should be permitted to decide how, if at all, this Court's decision in *Dabit* will affect the outcome of this case." Petitioner's Reply Brief 4. If this Court were to enter a GVR order, that issue would be for the federal district court to decide in the first instance, not the Circuit Court for Madison County.

That is so because, as previously explained, if a GVR order is issued, this case must return to the federal district court in light of that court's existing judgment dismissing the action. *See infra* pp. 2-3. In addition, returning this case to the federal district court would be appropriate in light of SLUSA, which creates a highly unusual removal mechanism so that a defendant may obtain a decision by a federal district court on the federal preclusion defense created by SLUSA.

In fact, however, this Court's *Dabit* decision would leave the district court with nothing further to decide on the only relevant issue: the district court's judgment of dismissal under SLUSA was correct. The petition for certiorari should be denied.

June 16, 2006

Respectfully submitted,

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